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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 114

JUAN POSADAS, JR., Collector of Internal Revenue of the Government of the Commonwealth of the Philippine Islands,
Petitioner,

vs.

THE NATIONAL CITY BANK OF NEW YORK,
Respondent.

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER, UPON QUESTIONS OF THE COURT AT THE ARGUMENT

I

In answer to the question of the Chief Justice near the closing on Wednesday, December 11th, as to who may raise this question of the power of this plaintiff, or of its character as a federal instrumentality in the Philippine Islands, the answer is that it may be raised by the local sovereign by way of defense when sued, as here, for money in a case where the plaintiff rests its supposed right of recovery on its character as a federal instrumentality in the Islands; and the defendant, the local sovereign, denies it. Plaintiff

sues for the recovery of moneys now in the Philippine treasury paid under protest as taxes,—capital taxes and deposits taxes,—on this local bank in Manila, and says in its complaint, as the basis of its right of recovery (R. 2), that as a national bank of the United States it is authorized to do business in the Philippine Islands and that, as such a national bank, it is, in the Philippine Islands, an instrumentality of the United States. The defendant government, the local sovereign, denies that, by its answer denying "generally and specifically each and every allegation contained in said complaint" (R. 8) and in its assignment of errors from the Trial Court to the Philippine Supreme Court, says (R. 141) that the Trial Court—

> "erred in holding that the branch of the National City Bank of New York in Manila, Philippine Islands, is an instrumentality of the United States Government".

That directly raises the question. Plaintiff sues the local sovereign for the recovery of these taxes which had been collected and are now in the government treasury, basing its right of recovery on its alleged character as a federal instrumentality "in the Philippine Islands". The defendant government denies that it is such an "instrumentality". That makes a direct issue. That denial of the allegation on which plaintiff bases its right of recovery is not a collateral attack upon its corporate existence within the meaning of the rule concerning collateral attack; which, as this court has stated it (*Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church*, 137 U. S. 568, 571-572), is that *de facto* corporate existence,

> "is all that is necessary to enable it to maintain an action against any one, *other than the State*, who has *contracted with* the corporation, or who *has done it a wrong*". (*Italics supplied*)

But this *is an action against the State;* and it is not based upon any contract, nor is it an action for tort or injury

suffered by the plaintiff; but it is an action against the State to recover moneys in the State treasury, based upon plaintiff's alleged character as a "federal instrumentality", which the State, the local sovereign, denies.

It is settled, of course, that a suit such as this against the Collector, the purpose of which is to reach moneys in the government treasury, is a suit against the government itself. *Smith* v. *Reeves,* 178 U. S. 436, 438-439. The defendant, the Philippine Government, is at least "*quasi*-sovereign", so that it may not be sued without its own consent. *Puerto Rico* v. *Rosahy,* 227 U. S. 270, 274-277. And this suit for the recovery from the government treasury of money paid under protest for taxes is based upon the Philippine government's own consent in Section 476 of the Philippine Administrative Code, Philippine Act No. 2711; and could not be maintained without such consent. Except as its powers are limited by Act of Congress, the Philippine Government by delegation from the Congress possesses all of the powers of local sovereignty as much as a State government. *America Insurance Co.* v. *Canter,* 1 Pet. 511. It is a completely organized government possessing all of the essential governmental powers. By section 21 of the Organic Act, "the supreme executive power" in the Islands is vested in the Governor General; the "general legislative power, except as herein otherwise provided" (Secs. 8, 12) is vested in the Philippine Legislature; and the local judicial power is vested in the insular Supreme Court and courts of first instance (Secs. 26 and 27). The general taxing power is vested in the local legislature both under the grant of "general legislative powers" and by express grant of the taxing power (Sec. 11), and the provision (Sec. 7) that the legislative authority thus granted

> "shall specifically extend * * * to all laws relating to revenue and taxation in effect in the Philippines".

And the Philippine statute under which these taxes were levied and collected, which the plaintiff here seeks to re-

cover back, was itself expressly ratified by the Congress. The taxes were levied under Section 1499 of the Philippine Administrative Code (defendant's answer; R. 8) Act No. 2711 of the Philippine Legislature of March 10, 1917, which was a direct re-enactment of the earlier Section 1654 of the Administrative Code of 1916, Philippine Act No. 2657 of February 24, 1916, effective July 1, 1916, which was in effect in the Philippines on August 29, 1916, the date of the enactment of the Jones Law, the Organic Act of that date, and was, therefore, among *"the laws now in force in the Philippines"* which that Act directs (Sec. 6)

> "shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States" (*our original brief,* Point IV, pp. 43-44).

Under those provisions, those broad grants by the Congress to the local sovereignty of general legislative and taxing powers, and the specific ratification by the Congress of the local statute under which these particular taxes were levied, the levy of the taxes by the local sovereignty was undoubtdly valid, and the money paid for them into the treasury of the local government could not be recovered back, *unless* there was some limitation by the Congress,—either in express words in an Act of Congress, or by necessary implication from some Act of Congress,—limiting the exercise of those powers in some way, or carving some exception out of them.

Plaintiff alleges that there is such an exception, and that plaintiff comes within the exception. It says that the exception is, that the taxing powers of the local sovereign do not extend to "instrumentalities of the United States" in the Philippine Islands; and it alleges that it is such an "instrumentality of the United States", within those Islands. On that allegation it sues the local government to

recover this money from the Treasury. The local government in defense denies its allegation that the plaintiff is, within those Islands, such an "instrumentality of the United States"; and says that, within those Islands, the plaintiff is not clothed with that character, and hence is not within the alleged exception to the local sovereign's general taxing powers.

That is the issue here presented; and it is submitted that the local government is not in any way estopped to make that defense. It is not a collateral attack on the corporate existence, within the rule forbidding such collateral attack by an individual.

This issue, thus presented, does not, in fact, question the corporate existence, *de facto*, of the banking institutions carried on in plaintiff's name in the Islands. It questions only their *power* to act there in a particular capacity, and whether they are actually clothed with the powers they claim, to act within those Islands as "instrumentalities of the United States". That does not go at all to the question of their corporate existence.

And the rule against collateral attack on the corporate existence has never been extended to prevent questioning,—even by an individual, or in any form of action where the question may come up,—the power of any corporation,—(whether *de facto or de jure*),—to exercise a particular power, or to act in a particular capacity. That is simply a question of *ultra vires*, as distinguished from a plea of *nul tiel corporation*. And there is no rule forbidding any defendant, — an individual defendant, — or *a fortiori* the local sovereign,—when sued by a corporation, from setting up the plea of *ultra vires* in defense,—that the corporation is not clothed with the particular power upon which it bases its right of recovery in this particular case.

The general rule, as stated in Fletcher, Cyclopedia of Corporations, Vol. I, Sec. 277, pp. 549-550, is:

"There is also 'an obvious distinction between a

> challenge to the corporate existence and a challenge to the power which may be exercised by the corporation, whether it be a *de facto* or *de jure* corporation. In the former case the general rule is * * * that the corporate existence may not be attacked collaterally; but it has always been held that the *ultra vires* acts of the corporation may be thus challenged, often by the corporation itself. And this rule would apply as well to a *de facto* corporation as to one *de jure*.
>
> "There is no such thing in law as a *de facto* power. So a contention by heirs of a deceased person that corporations to whom he devised land are religious corporations and hence cannot take such property is not a collateral attack on the existence of such corporations."

That is the only issue presented here; whether this plaintiff is clothed, within the Philippine Islands, with the statutory power, under Section 25 of the Federal Reserve Act, or under the National Bank Act, to act, within the Philippine Islands, as an "instrumentality of the United States" and so to claim exemption from local taxation as such an "instrumentality". Plaintiff alleges that it is, and bases its supposed right of action upon that claim. The defendant government denies that claim, and says that, within those Islands, the Congress has not clothed this plaintiff with those statutory powers as such a "federal instrumentality".

Respondent's suggestion that R. S. 5239 affects this situation in any way, has already been answered in our "Reply Brief" (pp. 16-17). And since the corporation "can do only what is authorized by its charter", and "cannot migrate", although it

> "may exercise its authority in a foreign territory *upon such conditions as may be prescribed by the law of the place*" (*Railroad Co.* v. *Harris*, 12 Wall. (79 U. S.) 65, 81, SWAYNE, J.; *Italics supplied*),

and since its charter powers are limited by the Congress

by the Acts under which it is created, the National Bank Act taken in connection with Section 25 of the Federal Reserve Act, to the limits of the State (New York) where it is located, and to such foreign countries and "insular possessions" to which it may be permitted to go with the license of the Federal Reserve Board—(*but not including the Philippine Islands,* since the Congress has not seen fit to extend either of those Acts to those Islands, and has, therefore, not extended the charter powers of this plaintiff to those Islands),—it follows that, when it undertakes to go there, beyond the territorial limits assigned it by the Congress by its charter powers, it necessarily goes there, as MR. JUSTICE SWAYNE said in the *Harris case, supra,*

> "upon such conditions as may be prescribed by the law of the place";

that is to say, subject to all of the laws of the local sovereignty, the government of the Philippine Islands, including that government's local taxing laws under which the taxes here in question were levied and collected by the local government officials, in like manner as upon any other bank or financial institution doing business in those Islands.

II

In answer to the question from the bench, near the beginning of the argument on Wednesday, December 11th, as to whether or not the provision of Section 1 of the "Foraker Act", the former Organic Act for the Philippines (Act of July 1, 1902, c. 1369, Sec. 1, 32 Stat. 691) quoted in our "Brief for Petitioner" (pp. 20, 47) that:

> "The provisions of Section 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands",

was repealed by the present Organic Act for the Islands, the "Jones Law" of August 29, 1916, or has ever been repealed, or whether it is still in effect, THE ANSWER is that

that provision of the "Foraker Act" was not repealed by the "Jones Law", nor ever by any other Act, and that it is still in effect.

Section 31 of the "Jones Law", Act of August 29, 1916, c. 416, 39 Stat. 545, quoted in Appendix I (p. 49) of our "Brief for Petitioner" expressly provides:

> "Sec. 31. That all laws or parts of laws applicable to the Philippines not in conflict with any of the provisions of this Act are hereby continued in force and effect."

Manifestly, the provision of Section 1 of the "Foraker Act" directing that Section 1891 of the Revised Statutes should not apply to the Philippine Islands, was "not in conflict with any of the provisions" of the "Jones Law". Quite to the contrary, it was entirely consonant with the policy of the Congress expressed in Section 5 of the "Jones Law" (quoted in our "Brief for Petitioner" pp. 29, 48) that the statutory laws of the United States thereafter enacted should not apply to the Philippine Islands, "except when they specifically so provide, or it is so provided in this Act." There is no other Act repealing, or in any way affecting, that provision of Section 1 of the "Foraker Act". It is still in full force and effect.

III

In reply to the question near the close of the argument on Thursday, December 12th, as to the manner in which the words "insular possessions" first appeared in Section 25 of the Federal Reserve Act (when they were brought into it by the amendatory Act of September 7, 1916), THE ANSWER is that they were brought in at that time as one of the changes appearing in a *complete revision* of Section 25 of the original Act, as appears from a copy of the pertinent portions of the amendatory Act of September 7, 1916 (c. 461, 39 Stat. 752, 755-756), in the Appendix to this Memo-

randum (*infra*, pp. 16). As there appears, the title of the amendatory Act is

> "An Act to amend certain sections of the Act entitled 'Federal Reserve Act', approved December twenty-third, nineteen hundred and thirteen".

The first section of the amendatory Act (39 Stat. at p. 752) amends Section eleven of the original Act by adding a new clause at the end of it. The next section amends (pp. 752-753) Section 13 of the original Act "to read as follows". The third section (pp. 753-754) amends Section 5202 of the Revised Statutes "to read as follows"; and the fourth section (p. 754) amends sub-section "(e)" of Section 14 of the original Act "to read as follows"; and the fifth (p. 754) that Section 16 of the original Act be amended "to read as follows". The sixth section provides (pp. 754-755) that Section 24 of the Act be and is "amended to read as follows".

And the seventh section then provides with relation to Section 25 of the Original Act, as quoted in the Appendix hereto (pp. 755-756; *infra*, Appendix, p. 16).

> *"That section twenty-five be, and is hereby, amended to read as follows"*,

and then follows Section 25 at length, as thus re-enacted (*Appendix, infra*, p. 16).

It thus appears that Section 25, as thus re-enacted, was a complete substitution by the Congress of the new section for the old. It was a complete new expression of the will of the Congress on the entire subject. It, therefore, worked a repeal of the former Section 25 of the old Act of 1913, and constituted the entire law on the subject from that date forward, and the complete expression of the Congressional will. It is, therefore, immaterial whether or not the single word "dependencies", standing alone, as used by the Congress in Section 25 of the original Act of December

23, 1913 (c. 6, 38 Stat. 251, 273; "Brief for Petitioner" pp. 28-29, and Appendix I, p. 58) did, or did not, extend to the Philippines in view of the provision of Section 1 of the "Foraker Act" then in force, that Section 1891 of the Revised Statutes should not run to the Philippines. Whether or not that section in its original form as enacted in 1913 ran to the Philippines, in any event, in view of the fact that, as pointed out in our "Brief for Petitioner" (pp. 32-33), administratively, no license was in fact ever issued for any Philippine branch during those years from 1913 to 1916, and that no national bank apparently ever attempted to establish any branch in those Islands during that period, so that there were no possible "vested rights" to be affected in any way, *the complete new revision of the section by the amendatory Act* of September 7, 1916, *must be taken,* as we have said, *as the complete expression of the Congressional will upon the subject,* and as the complete statement of the law from that time forth, and as a repeal of any possible contrary interpretation that might theretofore have been given to the use of the word "dependencies" in the original Act of 1913 in view of the Organic Act for the Philippine Islands as it stood at that time ("Foraker Act", Sec. 1, *supra*).

And, of course, this new enactment of September 7, 1916, must be deemed to have been made by the Congress in the light of, and to be controlled by, the provision which the Congress had itself enacted only nine days previously, as pointed out in our "Brief for Petitoner" (pp. 29-30), expressly directing that any "laws of the United States" which it should thereafter enact should never be taken or interpreted as applying to the Philippine Islands "except when they *specifically* so provide" ("Jones Law", Act of August 29, 1916, 39 Stat. 545, 547; "Brief for Petitioner", Appendix I, p. 48).[1]

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[1]As to the continuing effect of such a ~~statutory~~ statutory rule of interpretation enacted by the legislative authority, until the

That this is the interpretation to be given to such a new Act of the Congress constituting a complete revision of the law on the subject and substituting this wholly new Section 25 for the former Section 25 of the Act, and that it was a repeal of the former Section 25 of the old law, is well established by the decisions of this court.

Thus, with relation to the substitution of a new section by the Act of February 5, 1867, for Section 25 of the original Judiciary Act of 1789, this court said in *Murdock* v. *City of Memphis,* 20 Wall. (87 U. S. 590, 617:

> "A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, *and to substitute their will in that regard entirely for the old law upon the subject.* We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.*
>
> "The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place." (*Italics supplied*)

In *Pana* v. *Bowler,* 107 U. S. 529, 538, in relation to the effect of an amendatory Act substituting a new section

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legislative authority itself elects to change the rule so established by it, compare *Tomlinson* v. *Jessup,* 15 Wall. (82 U. S.) 454, 457 (FIELD, J.).

* Citing, *United States* v. *Tynen,* 11 Wallace, 88; *Henderson Tobacco, Ib.* 652; *Bartlet* v. *King,* 12 Massachusetts, 537; *Cincinnati* v. *Cody,* 10 Pickering, 36; *Sedgwick on Statutes,* 126.

(Sec. 10) for two sections (Secs. 9 and 10) of a former Act, this court said:

> "It thus appears that sect. 10 of the amendatory act covered the entire subject embraced by sects. 9 and 10 of the original act. It related to the same railroad company; it prescribed different methods of procedure in reference to the same subject, and embraced entirely new provisions, thus plainly showing that it was intended as a substitute, *pro tanto,* for the original act. Sect. 10 of the amendatory act therefore operated as a repeal, by implication of sects. 9 and 10 of the original act, and removed the restriction limiting to $30,000 the amount which could be donated by a township to the railroad company. *United States* v. *Tynen,* 11 Wall. 88; *Henderson's Tobacco, id.* 652; *Murdock* v. *City of Memphis,* 20 *id.* 590; *King* v. *Cornell,* 106 U. S. 395."

And in *District of Columbia* v. *Hutton,* 143 U. S. 18, 26-27, the court said:

> "We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this court in *United States* v. *Tynen,* 11 Wall. 88, 92, it is this: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; *and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.*' See also *Murdock* v. *Memphis,* 20 Wall. 590, 617; *Tracy* v. *Tuffy,* 134 U. S. 206, 223; *Fisk* v. *Henarie,* 142 U. S. 459." (*Italics supplied*)

Under the circumstances it is believed that the reenact-

ment of Section 25 of the Federal Reserve Act by the amendatory Act of September 7, 1916, was intended by the Congress to express its complete will upon that subject including the places to which national banks might go by the establishment of branches under license from the Federal Reserve Board, and that the Congress there used the expression "dependencies or insular possessions" advisedly, with the express intent of excluding the Philippine Islands from the purview of the Act, in view of the express rule of construction established by the Congress only nine days earlier by Section 25 of the Act of August 29, 1916, and then new Organic Act for those Islands, that any Acts of the Congress thereafter enacted should not be understood as including the Philippine Islands in any way, unless the Congress should itself "specifically" so direct;[2] and in view of the fact also that, as pointed out in our original brief ("Brief of Petitioner" pp. 31-32, and also Appendix I, pp. 52-53); Appendix III, pp. 71-79), and in our "Reply Brief" (pp. 8-9) the Congress had theretofore instituted a wholly different national banking system for the Philippine Islands which has really become in the Philippine National Bank "an arm of the Philippine government", a governmental agency in a much more real and substantial sense than are national banks of the United States.

It was evident that the Congressional intent was not to interfere with that Philippine national banking system by injecting into it any branches of national banks of the United States. The Congress manifestly considered it un-

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[2] And in view of the fact that the Congress evidently had this rule of construction which it had thus established, clearly in mind, because by the Income Tax Act of the very next following day, September 8, 1916, which it did desire should run to the Philippines, it actually did "specifically" so direct in the Act (Act of September 8, 1916, c. 463, Title I, Sec. 23, 39 Stat. 756, 776. See footnote 15, pp. 29-30, "Brief for Petitioner").

necessary and undesirable to extend the continental national banking system to those Islands.[3]

Respondent calls attention to the acts of some administrative authorities which it considers important as administrative interpretations of the Federal Reserve Act and the National Bank Act as running to the Philippine Islands. But we may add that there may have been some administrative acts by some departments of the government treating some Acts of Congress as being in effect in the Philippines, which the Congress never extended there. It appears that the National Industrial Recovery Administration originally considered the National Industrial Recovery Act as being in effect in those Islands until it was halted by the opinion of the Attorney General of December 2, 1933, that it did not run there (32 Ops. Atty. Gen. 360-364, Advanced Sheets, December 2, 1933; "Brief for Petitioner" pp. 24-25). As to any such administrative acts, not shown to have been based upon a careful consideration or examination of the question as to whether or not the Congress actually intended the statute to run to the Philippines, what this court said

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[3] Philippine Act No. 2612 enacted February 4, 1916, creating the Philippine National Bank and (Par. 6) merging the government Agricultural Bank into it was, of course, one of the "laws now in force in the Philippines" which the Congress directed by Section 6 of the Organic Act of August 29, 1916, "shall continue in force and effect" ("Brief for Petitioner" Appendix I, p. 48). Such an important act as that establishing the Philippine National Bank could not escape the attention of the Congress, which must have had it in contemplation when it enacted the amendatory act of September 7, 1916, excluding the Philippine Islands from the scope of the amended Section 25 of the Federal Reserve Act.

in *Myers* v. *United States*, ~~112~~ 272 U. S. 52, 170-171, concerning the comparatively little weight to be accorded to an administrative construction under those circumstances where it is not shown that the question was actively examined by the administrative authorities, is always pertinent. (See, also, *Springer* v. *Philippine Islands*, 277 U. S. 189, 205, citing the *Myers* case.)

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

SERAFIN P. HILADO,
Solicitor-General of the Philippine Islands,
Of Counsel.

APPENDIX

Federal Reserve Act—Amendatory Act of September 7, 1916, c. 461, 39 Stat. 752, 755-756.

"Chap. 461. An Act to amend certain sections of the Act entitled 'Federal Reserve Act', approved December twenty-third, nineteen hundred and thirteen.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act entitled 'Federal Reserve Act', approved December twenty-third, nineteen hundred and thirteen, be, and is hereby amended as follows:

* * *

"That section twenty-five be, and is hereby, amended to read as follows:

'Sec. 25. Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

'First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

'Second. To invest an amount not exceeding in the aggregate ten per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions.

'Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking operations proposed are to be carried on. The Federal Reserve Board shall have power to approve or to

reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on.

'Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described under subparagraph two of the first paragraph of this section shall be required to furnish information concerning the condition of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

'Before any national bank shall be permitted to purchase stock in any such corporation the said corporation shall enter into an agreement or undertaking with the Federal Reserve Board to restrict its operations or conduct its business in such manner or under such limitations and restrictions as the said board may prescribe for the place or places wherein such business is to be conducted. If at any time the Federal Reserve Board shall ascertain that the regulations prescribed by it are not being compiled with, said board is hereby authorized and empowered to institute an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths in order to satisfy itself as to the actual nature of the transactions referred to. Should such investigation result in establishing the failure of the corporation in question, or of the national bank or banks which may be stockholders therein, to comply with the regulations laid down by the Federal Reserve Board, such national banks may be required to dispose of stock holdings in the said corporation upon reasonable notice.

'Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each

fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

'Any director or other officer, agent, or employee of any member bank may, with the approval of the Federal Reserve Board, be a director or other officer, agent, or employee of any such bank or corporation above mentioned in the capital stock of which such member bank shall have invested as hereinbefore provided, without being subject to the provisions of section eight of the Act approved October fifteenth, nineteen hundred and fourteen, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'

"Approved September 7, 1916."

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 114

JUAN POSADAS, JR., Collector of Internal Revenue of the Commonwealth of the Philippines, *Petitioner,*

vs.

THE NATIONAL CITY BANK OF NEW YORK, *Respondent.*

For convenience in reading, this letter heretofore submitted for the Petitioner upon questions from the bench during the argument is now printed, without change.

December 17, 1935

Honorable Charles E. Cropley, Clerk,
United States Supreme Court,
Washington, D. C.

Re: Juan Posadas, Jr., Collector of Internal Revenue of the Government of the Commonwealth of the Philippine Islands
vs.
The National City Bank of New York
No. 114

Dear Mr. Cropley:

With reference to the question by MR. JUSTICE SUTHERLAND at the argument of this case, as to the origin of the words "insular possessions" put into Section 25 of the Federal Reserve Act by the amendatory Act of September 7, 1916 (c. 461, 39 Stat. 752, 755-756), a search of the Con-

gressional Record and of Committee reports and hearings reveals the following information which it is requested be submitted to the Court:

1. The phrase first used, in the Federal Reserve Act, was "dependencies of the United States". Section 25 of the original Act of December 23, 1913, c. 6, 38 Stat. 251, 273. Very little is found to throw light on the specific intent of the Congress in using that phrase. The bill was the "Glass Bill", introduced in the House by MR. GLASS on August 29, 1913, and referred to the Committee on Banking and Currency (H. R. 7837, 63rd Congress, 1st Sess.; Cong. Rec., Vol. 50, p. 3925). It was reported with amendments on September 9, 1913 (House Report No. 69; Cong. Rec., Vol. 50, p. 4633); debated on September 10, 1913, and the following days (*ib.*, pp. 4638, *et seq.*); and passed the House on September 18, 1913 (Cong. Rec., Vol. 50, pp. 5129-5130).

The Senate report, No. 133 from the Banking and Currency Committee, was presented November 22, 1913 (Cong. Rec., Vol. 50, pp. 6002-6009; Majority and Minority Reports). The bill was debated at length and considerably changed in the Senate; but the section as to "foreign branches" remained substantially as in the House bill, although it was renumbered Section 25, instead of Section 28.

The only thing said about that section by MR. GLASS in his careful explanation of the bill on the floor of the House was (*ib.*, p. 4651) in

> "Conclusion". "* * * minor details, * * * fully set out in the printed report. * * *. We have made provision for foreign trade by furnishing quicker exchanges and affording infinitely better banking facilicilities in that field of enterprise."

MR. M. F. PHELAN of Massachusetts, of the Committee (See Committee Appointments, June 3, 1913, Cong. Rec., Vol. 50, p. 1871), said (*ib.*, p. 4676):

"The bill, furthermore, seeks to develop our *foreign trade* by its provision contained in *Section 28* and in *sub-section "E" of Section 15.* Today there is not a single United States bank in a foreign country. Our present banking laws do not permit either the establishment of national banks or branches of such banks in *foreign countries.* Section 28 provides for the establishment of branches of national banks possessing the required capital. Supplementary to this provision, subsection E of section 15 permits Federal reserve banks to open and maintain banking accounts and to establish agencies for certain purposes in *foreign countries.*" (*Italics supplied*)

The Committee report (House Report No. 69, *supra*) says (p. 50) under "*Banking Facilities for Foreign Trade*":

"The committee is of the opinion that every good purpose * * * can be attained by the adoption of the plan it has proposed, which consists essentially of provision for the establishment of *foreign branches* by existing national banks when such banks have an adequate capital for the kind of work in which they propose to engage, and are found by the Federal reserve board to be in proper condition for undertaking such an enterprise". (*Italics supplied*)

It says nothing about "dependencies"; although Section 28 of the bill then contained the phrase "the foreign country or countries or the dependencies of the United States where the banking operations proposed are to be carried on". (Library of Congress, bound volume of House bills, 63rd Cong.; "J. 50—21—7684-7689").

In the majority report in the Senate (Report No. 133, *supra*), there is only (p. 28):

"Eighth. Foreign branches were also provided for national banks having a capital and surplus of a million dollars or more, with the approval of the Federal Reserve Board (Sec. 28, p. 77).

"This is a very important amendment and one of far-reaching importance to the foreign commerce of

the United States, the purpose of which is so obvious as to need no explanation".

The minority report says nothing about it, although it includes this same Section 28 (p. 132) in the minority's proposed substitute. In the Hearings before the House Committee (Library of Congress, volume "H. G.; 2481—A-4—1913", 745 pages, marked "Banking and Currency Reform; House Hearings; 1913—1913"), no discussion of this subject has been found. In the Senate Committee hearings (3 Vols. with index; Library of Congress, "J. 66, Books 6530, 6531 and 6532"), the only thing found is that during the testimony of Mr. L. P. Peck, cashier of the First National Bank of Hawaii (Vol. 2, pp. 2875, *et seq.*), at the beginning of his testimony there appears (p. 2875):

> "MR. PECK. I would like the privilege of calling the attention of the Committee, Mr. Chairman (SENATOR REED), that the act provides for the entry into a new system of national banks *located in the continental United States.* That, in itself, *eliminates the insular United States*—the organized *Territory of Hawaii.*" (*Italics supplied*)

Mr. Peck's statement was not challenged in any way. During his testimony, this appears (*ib.*, p. 2881):

> "SENATOR O'GORMAN. 'Do you think it was ever designed that this was to be extended to Hawaii, Porto Rico, or the Philippines?'
>
> "SENATOR NELSON. 'I do not know that they have any national banks there.'
>
> "SENATOR O'GORMAN. '*It should be confined to this continent;* in my judgment *that was the intention of the framers of the bill.*'" (*Italics supplied*)

That is all that has been found as to the intention of the Congress in using this phrase "dependencies of the United States", in Section 25 of the Act of 1913. **If by that word, "dependencies", the Congress intended to designate the "insular possessions"** which the United States owns out-right, and which are a part of the "territory belonging to the United States", absolutely at the disposal of the Congress under

its constitutional power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Const. Art. IV, Sec. 3, cl. 2), **then it was a new use by the Congress of the term "dependencies".** The Congress had theretofore, in legislating for those possessions, called them *"insular possessions"* or sometimes *"island possessions"*. (See Acts of Congress collated in the Memorandum of the Chief of the Bureau of Insular Affairs (General McIntyre) for the Secretary of War, May 14, 1917; approved in the opinion of the Attorney General, August 30, 1917; copies herewith).

The word *"dependencies"*,—as contra-distinguished from *"possessions"*,—*might properly designate independent peoples having their own sovereignty, but subject to the supervision or control of a greater power;* as for example, the so-called independent principalities of India, as contra-distinguished from the British Crown colonies, which latter, like our "possessions", have no independent sovereignty of their own.

When the Federal Reserve Act was enacted in 1913, there were two countries possessing independent sovereignty, but standing in a subordinate relation to the United States, subject to its supervision and control in important respects and relying on its protection; viz., Cuba and Panama (CUBA, "Platt Amendment", Act of March 2, 1901, and Treaty of May 22, 1903, and corresponding provisions embodied in the Cuban Constitution; PANAMA, Isthmian Canal Convention of November 18, 1903, and corresponding provisions in the Panaman Constitution). MR. GLASS, Chairman of the House Committee on Banking and Currency, three years later, in explaining his bill (H. R. 13,391) in the 64th Congress to amend the Federal Reserve Act, spoke on May 4, 1916 (Cong. Rec., Vol. 53, p. 7422),

> "of the six branch banks established abroad, in the South American countries *and in Panama and Cuba.*"

which is some indication that the Federal Reserve Act had been thought of as authorizing establishment of "foreign branches" under Section 25 only in "foreign countries" wholly independent of the United States, and in those two semi-dependent countries, Panama and Cuba. No branch banks had been established in any of the "possessions" of the United States.

The CENTURY DICTIONARY definition of "dependency" is:

> "4.—That which is subordinate to and dependent upon something else; especially, a territory subject to the control of a power *of which it does not form an integral part;* a dependent state or colony; as the sun and its *dependencies;* the *dependencies* of Great Britain.
>
> "The rapidly rising importance of the Anglo-Indian and Australian Colonies and *dependencies*".
>
> —Hinton, English Radical Leaders, p. 42.
>
> "The great *dependency* of India, with its two hundred millions of people".
>
> —Contemporary Review, XLIX, 763.

"WORDS AND PHRASES" (1st Series), Vol. 2, p. 1991, interprets MR. JUSTICE WASHINGTON's definition, at the Circuit, in *United States* v. *The Nancy,* 27 Fed. Cas. 69, 71, thus:

> " 'Dependencies', as used in the non-importation law of March 2, 1812 (2 Stat. 651), which revived the act of March, 1809, the provisions of which extended to the possessions as well as the colonies and dependencies of Great Britain, implied some civil and political relation borne by one country to another as its superior, different from that of a mere possession."

If that be the significance which the Congress intended to give the phrase "dependencies of the United States", in using it in Section 25 of the Federal Reserve Act of December 23, 1913, with relation to "foreign branches" of national banks, then the purpose, when afterwards revising the Act three years later, by the Act of September 7, 1916,

in changing the phraseology so as to include the "insular possessions", is understandable.

But, of course, "insular possessions" as used on September 7, 1916, *did not include the Philippines,* because of the express provision in the Philippine Organic Act of August 29, 1916, enacted only nine days earlier, expressly excluding the Philippines from the purview of any such general phrase, *unless* the Philippines were "specifically" mentioned in the Act; as they were not, in this revision of the Federal Reserve Act ("Brief for Petitioner", pp. 28-30).

The Congressional Record shows that SENATOR HITCHCOCK, Chairman of the Senate Committee for the Philippines, in charge of the bill for the Philippine Organic Act, was also one of the conferees for the Senate on the bill to amend the Federal Reserve Act (Cong. Rec., Vol. 53, p. 233, Committee Appointments, December 13, 1915; *ib.*, p. 12,058, Appointment of Senate conferees on the bill to amend the Federal Reserve Act).

2. With specific reference to MR. JUSTICE SUTHERLAND'S question of the origin of the insertion of the phrase *"insular possessions"*, in the amendatory Act of September 7, 1916, the bill (H. R. 13,391, 64th Congress, 1st Sess.) for that Act was introduced in the House by MR. GLASS on March 18, 1916, and referred to the Committee on Banking and Currency. It was a bill "to amend" the Federal Reserve Act "by adding a new section". It was reported to the House on March 28, 1916, with Committee amendments (House Report No. 447; Cong. Rec., Vol. 53, p. 5054); passed the House on May 4, 1916 (Cong. Rec., Vol. 53, pp. 7420-7422); and appears in full in the Congressional Record (*ib.*, p. 7421). As passed by the House, it did not change the phraseology of the former Section 25 of the original Federal Reserve Act in any way, but added a new section "25a", to permit national banks, with a capital of a million dollars or more, to

"purchase and hold stock in foreign or domestic corporations, other than national banks, which are authorized by their charters to do a banking business in foreign countries exclusively."

The purpose was explained by the Committee Chairman, MR. GLASS (Cong. Rec., Vol. 53, p. 7422, May 4, 1916), thus:

"It is merely an amplification of the provisions of section 25 of the Federal Reserve Act authorizing national banks with a million dollars or more of capital to establish branches.

"It was found that under the provisions of the Federal Reserve Act only national banks of a very large capital could operate effectively, so that of the *six branch banks established abroad, in the South American countries, and in Panama and Cuba,* four of them had been established by the National City Bank of New York, and two by a banking institution here in Washington." (*Italics supplied*)

The Committee report (No. 447; March 28, 1916; Library of Congress; House Reports; 64th Cong., 1st Sess.) made the same explanation.

In the Senate, it was referred to the Committee on Banking and Currency on May 5, 1916, and was reported by SENATOR OWEN, Chairman, for that Committee, with Committee amendments, May 24, 1916 (Senate Report No. 481; Cong. Rec., Vol. 53, p. 8578). The Senate Committee amendments (printed, Cong. Rec., Vol. 53, pp. 10,998-10,999, July 14, 1916) were in fact an entirely new draft, a substitute for the House bill, and embodied a complete revision of Section 25, substantially as it appears in the Act as finally passed.

THAT COMMITTEE AMENDMENT INTRODUCED, FOR THE FIRST TIME, THE WORDS "INSULAR POSSESSIONS". The Committee report contains no explanation of the insertion of those words; nor did the Chairman, SENATOR OWEN, say anything about them, when explaining the Committee amendments

on the Senate floor. As to this section 25, he said only (Cong. Rec., Vol. 53, p. 11,002, col. 2):

> "Under the head of 'banking corporations authorized to do foreign banking business' we have struck out certain words in Section 25 and inserted these words in lieu thereof:*** (*reading*) *** The purpose of that provision is to permit the various banks of the United States, if they so wish, to cooperate together in establishing or taking stock in a bank which shall act as a medium for them in dealing with foreign financial affairs and through which they can transact their business, if they so please, by establishing a bank in which they will take stock. That is explained also in the letter of the Federal Reserve Board at considerable length."

The substitute bill passed the Senate on July 21, 1916, substantially as reported by its Committee (Cong. Rec. Vol. 53, p. 11,856); conference report agreed to by Senate and House; approved by the President on September 7, 1916, Public No. 270.

3. As to Mr. Justice Van Devanter's question at the argument concerning the Virgin Islands, nothing has been found to indicate that the acquisition of those islands in that year had any bearing, one way or the other, upon the insertion of the words "insular possessions" in the revision of Section 25 of the Federal Reserve Act. Denmark's cession of those Islands was in exactly the same language as Spain's cession of Puerto Rico and the Philippines. By Article II of the Treaty of Peace, December 10, 1898, Spain "cedes to the United States" Puerto Rico, and by Article III "cedes to the United States" the Philippines (30 Stat. 1754, 1755). In precisely the same language Denmark, by Article I of the Treaty of August 4, 1916, "cedes to the United States" the Virgin Islands (39 Stat., Part 2, p. 1706). The Virgin Islands became another "insular posses-

sion" of the United States, in the same category as the others.

No reference to the Virgin Islands has been found anywhere in the debates or in the Committee reports or hearings on the amendment of the Federal Reserve Act.

A copy of this letter is being sent to opposing counsel.

Very respectfully yours,

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

APPENDIX

Memorandum of Chief, Bureau of Insular Affairs; and Opinion of Attorney General.

May 14, 1917

MEMORANDUM for the Secretary of War.

Meaning of the term "Insular possessions of the United States."

Under date of April 11th the Secretary of State submits to the Attorney General this question:

> "I desire to be informed whether, in view of the provisions of the Act of Congress of March 2, 1917, 'To provide a civil government for Porto Rico and for other purposes' the Governor of Porto Rico has authority, or can be granted authority, by the President to issue passports."

After quoting Section 4075 of the Revised Statutes as amended by the Act of Congress approved June 14, 1902, and Section 4078 of the Revised Statutes of the United States, the Secretary of State adds:

> In "Rules Governing the Granting and Issuing of Passports in the Insular Possessions of the United States," signed by the President July 19, 1902, the Chief Executive of Porto Rico was authorized to issue passports in that island.
>
> In order to determine whether the Governor of Porto Rico now has authority, or may be granted authority, to issue passports, it seems necessary to decide whether Porto Rico now has the status of one of the "insular possessions of the United States", or whether it is an organized territory and a part of the United States proper. In the latter case, it does not appear that the Governor of Porto Rico has authority, or can be granted authority, to issue passports.

The first paragraph above quoted is technically in error. The Chief Executive of Porto Rico was not authorized by title to issue passports, but it was stated:

"Application for a passport by a person in one of the insular possessions of the United States should be made to the *chief executive of such possession*",

and this was evidently construed in the appropriate bureau of the Department of State as including the Governor of Porto Rico.

It is the second paragraph above, however, to which it is desired to call particular attention, for it involves what is believed to be the fallacy that there is some conflict between a "territory of the United States" and an "insular possession of the United States".

Many of the laws passed by Congress make it perfectly clear that by the term "insular possession of the United States" it is not designed to designate a particular form of government, and the Territory of Hawaii has been frequently so designated in legislation, as is shown by the following citations:

Section 5 of the Act of April 29, 1908, 35 Stat. L, Pt. 1, p. 70.

"That such of the navigation laws of the United States as are in force in the Philippine Islands in regard to vessels arriving in the Philippine Islands from the mainland territory and other *insular possessions* of the United States shall continue to be administered by the proper officials of the government of the Philippine Islands."

It is manifest that the term "other insular possessions of the United States" in the above included the Territory of Hawaii, and the law has been so construed.

Act making appropriations for the Post Office Dept. May 27, 1908, 35 Stat. L., pt. 1, p. 406.

. . . "and for service in Alaska, Porto Rico, Philippine Islands, Hawaii, or other *island possessions* . . ."

Act to regulate the immigration of aliens to, and the residence of aliens in, the United States.

"Sec. 12. That upon the arrival of any alien by water at any port within the United States on the North American Continent from a foreign port or a port of the Philippine Islands, Guam, Cuba, Porto Rico, or Hawaii, or at any port of the said *insular possessions* from any foreign port, or from a port of another *insular possession* of the United States . . ."

The term "said insular possessions" makes perfectly clear the inclusion in that term of Porto Rico and Hawaii.

In a number of Acts it has been provided that the term "Territory" shall include the insular possessions of the United States.

In the Tariff Act of 1909 it was provided:

"there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into *any of its possessions* (except the Philippine Islands and the islands of Guam and Tutuila) the rates . . ."

The expression "any of its possessions" obviously included Porto Rico, and the law is so construed.

Act to regulate the immigration of aliens into the United States, approved Feb. 20, 1907, 34 Stat. L. pt. 1, p. 898, it is provided in Section 1, "Provided further, That whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any *insular possession* of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such *insular possessions* or from the Canal Zone."

This provision was intended to apply particularly to the Territory of Hawaii.

A reading of the laws with reference to the noncontiguous territory of the United States makes it perfectly clear that the expressions "insular possessions of the United States" and "island possessions of the United States", which are used interchangeably are not intended to describe a particular form of government, but are used in the geographic sense, and are quite as applicable to a Territory of the United States if located on an island as to any other government so situated.

The particular question—whether the Governor of Porto Rico shall issue passports, or not—is not of importance to this Department. It is thought that the law with reference to the granting of passports in the insular possessions leaves the matter entirely in the discretion of the President to authorize, or not, the granting of such passports by the Chief Executive or other officers of such possessions, and that whether the Governor of Porto Rico is hereafter to issue passports is a matter, under the law, entirely within the discretion of the President.

It is, however, the view of this Department that the territorial status of Porto Rico was not changed by the recent organic act and that a decision indicating that there had been such a change might have far-reaching effects.

It is, therefore, recommended that the Honorable the Secretary of State and the Honorable the Attorney General be requested to reconsider the question submitted, with the foregoing in view. Apparently, the question submitted does not require a legal decision in view of the fact that it is entirely within the discretion of the President to permit, or not, the Governor of Porto Rico to issue passports.

(Signed) FRANK MCINTYRE,
Chief of Bureau.

DEPARTMENT OF JUSTICE
WASHINGTON

The Honorable August 30, 1917

The Secretary of State.

Sir:

I have the honor to acknowledge the receipt of the communication of the Acting Secretary of State dated July 25, 1917, requesting reconsideration of the opinion of May 8, 1917, upon the question whether in view of the Act of March 2, 1917, "To provide a Civil Government for Porto Rico and for other purposes", the Governor of Porto Rico has authority, or may be granted authority, to issue passports.

The issuance of passports is controlled by Section 4075 of the Revised Statutes as amended June 14, 1902, providing as follows:

> "Sec. 4075. The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and by such chief or other executive officer of the *insular possessions of the United States*, and under such rules as the President shall designate and prescribe for and on behalf of the United States; and no other person shall grant, issue, or verify any such passport . . . "

In your letter of April 11, 1917, submitting the question above referred to, it was stated that by the "Rules Governing the Granting and Issuing of Passports in the Insular Possessions of the United States", signed by the President July 19, 1902, the chief executive of Porto Rico was authorized to issue passports in that island; and it was suggested that in answering the question submitted it seemed "necessary to determine whether Porto Rico now has the status of one of the 'insular possessions of the United States' or whether it is an organized territory and a part of the United States proper."

In the opinion of May 8, 1917, it was stated that inasmuch

as Porto Rico has the status of an organized Territory it is no longer an "insular possession of the United States", and that accordingly the Governor of Porto Rico has not, and can not be granted, authority to issue passports.

The Acting Secretary of State now transmits with his letter of July 25, 1917, a copy of a letter of the Secretary of War and of a memorandum by the Chief of the Bureau of Insular Affairs supporting the view that the present political status of Porto Rico as an organized Territory is not inconsistent with that of an "insular possession of the United States."

I am convinced that this view is correct and that the opinion of May 8, 1917, is erroneous. The words "insular possessions of the United States" in their natural meaning more aptly refer to geographical location than to a particular form of government. Unless, therefore, those words as used in this statute have some other meaning, a Territory of the United States may at the same time be an insular possession of the United States. There is nothing to indicate that Congress intended to use them here in any other than their natural meaning. On the contrary, the instances cited by the Chief of the Bureau of Insular Affairs show that the practice of Congress has been to use the words in a geographical sense and consequently as including Territories, when separated by water from the continental United States, such as Porto Rico and Hawaii.

It follows that the Governor of Porto Rico may still be authorized to issue passports under Section 4075 of the Revised Statutes, as amended. In this aspect of the question, it is unnecessary for me to express any view as to the present status of Porto Rico as an organized or unorganized territory, and I accordingly withdraw what was said in my opinion of May 8, 1917, on that point.

Respectfully,

(Signed) T. W. Gregory,
Attorney General.